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## TRANSFORMING THE “THURMOND RULE” IN 2016

*Carl Tobias\**

Senators vigorously dispute the Thurmond Rule’s (Rule) meaning in the 2016 presidential election year. Developed by Strom Thurmond (R-S.C.), the Rule is a peculiar tradition—*not* a statute or even a powerful dictate, like Senate rules, which bind members. The party not controlling the White House systematically invokes the custom during presidential election years to halt judicial designees’ consideration until November with the hope that its standard bearer prevails and, thus, can appoint jurists.

This evaluation suggests that the Rule invites partisan manipulation, shifting with the political winds to suit both parties’ distinct needs. For example, in 2004, when then-Senate Judiciary Committee Ranking Member Patrick Leahy (D-Vt.) deployed it against George W. Bush’s nominees, then-Chair Orrin Hatch (R-Utah) and current-Majority Leader Mitch McConnell (R-Ky.) strenuously asserted that no Thurmond Rule existed. In 2008, current-Chair Chuck Grassley (R-Iowa) similarly deemed the Rule “plain bunk.” This year, he and McConnell characterized the tenet as “flexible,” while Grassley declared that nominee confirmations generally end at the summer recess. Because confusion plagues definition of the stricture, and the Rule’s incessant use dramatically exacerbates the vacancy crisis, its perpetuation merits scrutiny.

This piece first analyzes the Rule’s history. Part II explains the convention and its deleterious consequences. Finding that each party reinterprets the notion to stymie appointments—which perverts the selection process, deprives courts of judicial resources for delivering justice, and intensifies the “confirmation wars”—the final Part proffers solutions. Because the Rule has multiple detrimental effects, it warrants abolition.

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\* Williams Chair in Law, University of Richmond. I wish to thank Margaret Sanner for valuable suggestions, Katie Lehen for valuable research, Leslee Stone for excellent processing, the *Emory Law Journal* editors for careful editing, as well as Russell Williams and the Hunton Williams Summer Endowment Research Fund for generous, continuing support. Remaining errors are mine alone.

## I. THE RULE'S ORIGINS AND DEVELOPMENT

The Rule's creation and growth deserve little examination here.<sup>1</sup> Thurmond crafted the precept in 1980, asking Ronald Reagan to urge that GOP senators delay Jimmy Carter's aspirants.<sup>2</sup> The measure has received checkered application ever since. For instance, evidence indicates that neither party capitalized on the doctrine very much ahead of Judge Robert Bork's 1987 disputed Supreme Court appointment.<sup>3</sup> The following year, Reagan's last, the Democratic majority prompted rapid confirmation for Justice Anthony Kennedy as well as seven circuit and thirty-four district nominees.<sup>4</sup> A prominent rejection of the concept, even at the tool's inception, was the suggestion by Edward Kennedy (D-Ma.), who deftly instigated Thurmond's promotion of appellate confirmation for Stephen Breyer *after* Reagan had defeated Carter.<sup>5</sup>

A related view espoused by Republican leaders for denying able, consensus prospects floor votes is that the Senate has treated President Barack Obama very fairly by approving twenty-three more nominees than Democrats approved at the equivalent juncture of Bush's final year.<sup>6</sup> This contention appears misleading

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<sup>1</sup> Others have assessed the creation and growth of the Thurmond Rule. *E.g.*, Russell Wheeler, *The "Thurmond Rule" and Other Advice and Consent Myths*, BROOKINGS INST. (May 25, 2016), <https://www.brookings.edu/2016/05/25/the-thurmond-rule-and-other-advice-and-consent-myths/>; BARRY J. McMILLION, FINAL SENATE ACTION ON U.S. CIRCUIT AND DISTRICT COURT NOMINATIONS DURING A PRESIDENT'S EIGHTH YEAR IN OFFICE (2016), <https://www.fas.org/sgp/crs/misc/R44353.pdf>.

<sup>2</sup> DENIS STEVEN RUTKUS & KEVIN M. SCOTT, NOMINATION AND CONFIRMATION OF LOWER FEDERAL COURT JUDGES IN PRESIDENTIAL ELECTION YEARS 7, 15–16 (2008); *see* BRUCE ALLEN MURPHY, *FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE* 512–22 (1988) (opposing the nominee by filibustering partly because 1968 was a presidential election year).

<sup>3</sup> ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* 322–27 (1st ed. 1989) (discussing the strategies used to oppose Judge Bork's appointment, which did not include the Thurmond Rule); MARK GITENSTEIN, *MATTERS OF PRINCIPLE: AN INSIDER'S ACCOUNT OF AMERICA'S REJECTION OF ROBERT BORK'S NOMINATION TO THE SUPREME COURT* 68–75 (1992) (discussing Democrat and Republican strategies in the Bork appointment without mentioning the Thurmond Rule); Wheeler, *supra* note 1 (noting the "ten post-August circuit confirmations in 1984, 1988, and 1992, during and immediately following Thurmond's chairmanship").

<sup>4</sup> DENIS STEVEN RUTKUS & BARRY J. McMILLION, *CONFIRMATION OF THE U.S. CIRCUIT AND DISTRICT COURT NOMINATIONS IN PRESIDENTIAL ELECTION YEARS* 6 tbl.1 (2012), <https://www.fas.org/sgp/crs/misc/R42600.pdf>. Even in 1992, which was George H. W. Bush's last year, the Democratic Senate majority helped approve eleven circuit and fifty-five district jurists. *Id.*

<sup>5</sup> SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* 261 (1999); RUTKUS & SCOTT, *supra* note 2, at 16–17.

<sup>6</sup> 162 CONG. REC. S3,614 (daily ed. June 8, 2016) (statement of Sen. McConnell); *see* 160 CONG. REC. S2,635 (daily ed. May 5, 2014) (statement of Sen. Grassley); Sarah Binder & Forrest Maltzman, *New Wars of Advice and Consent: Judicial Selection in the Obama Years*, 97 JUDICATURE 48, 50–51 (2013); Amanda Terkel, *Mitch McConnell: Senate GOP Has Treated Obama's Judicial Nominees 'Very Fairly'*, HUFFINGTON POST (Aug. 9, 2013), [http://www.huffingtonpost.com/2013/04/09/obamas-judicial-nominees\\_n\\_3046778.html](http://www.huffingtonpost.com/2013/04/09/obamas-judicial-nominees_n_3046778.html);

because it fails to consider the larger appointments context. The germane questions are (1) whether the upper chamber has equitably addressed federal court, litigant, and counsel needs manifested in the substantial vacancies, particularly judicial emergencies, over specified times, and (2) whether the President has nominated and the Senate has confirmed a sufficient number of accomplished, consensus nominees to satisfy those needs.<sup>7</sup>

Indeed, Democratic majorities have treated Republican Presidents better than Republican majorities have addressed Democratic chief executives since 1988. In Reagan’s last year, the Democratic majority rather promptly approved Justice Kennedy and seven appellate court nominees.<sup>8</sup> In 1992, this majority confirmed eleven Bush *père* appellate court jurists.<sup>9</sup> During 2004, the chamber appointed five Bush circuit and thirty-two trial judges, while in 2008, senators robustly confirmed four appellate court and twenty-four district court nominees.<sup>10</sup>

The approval record compares favorably with appointments made over Democratic chief executives’ terms. In 1996, the Republican majority approved

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RUTKUS & SCOTT, *supra* note 2, at 1 (stating similar views from President Bush and the Senate in 2008); Russell Wheeler, *Is a 112 Percent Increase in Judicial Vacancies Par for the Course?*, BROOKINGS INST. (June 6, 2016), <https://www.brookings.edu/2016/06/06/is-a-112-percent-increase-in-judicial-vacancies-par-for-the-course/>.

<sup>7</sup> The courts have eighty-eight openings and thirty-five emergencies; twenty-two of fifty-one nominees had hearings and votes; and Republican delays left nearly ninety vacancies for most of five years after September 2009. *Archive of Judicial Vacancies*, USCOURTS.GOV, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies> (last visited Aug. 31, 2016) (archiving judicial vacancy data starting in 1981); Carl Tobias, *The Republican Senate and Regular Order*, 101 IOWA L. REV. ONLINE 12, 15 n.17, 33–34 (2016) (noting that home-state senators’ support and overwhelming committee and floor votes demonstrate that nominees are able and uncontroversial).

<sup>8</sup> See RUTKUS & McMILLION, *supra* note 4, at 6 tbl.1; Press Release, Josh Earnest, Press Secretary of the White House, Press Briefing (March 18, 2016), <https://www.whitehouse.gov/the-press-office/2016/03/21/press-briefing-press-secretary-josh-earnest-3182016>. In October 1988, two circuit judges won approval. 134 CONG. REC. S16,382 (daily ed. Oct. 14, 1988) (announcing the confirmation of Judges John M Duhe, Jr., and Richard L. Nygaard).

<sup>9</sup> RUTKUS & McMILLION, *supra* note 4, at 6 tbl.1 After June 1992, six circuit jurists won approval. 138 CONG. REC. 22,991 (1992) (announcing the confirmation of Judge Susan H. Black); 138 CONG. REC. S12,771 (daily ed. Aug. 12, 1992) (announcing the confirmation of Judges Alvin A. Schall and Ilana Diamond Rovner); 138 CONG. REC. 24,279 (1992) (announcing the confirmation of Judge Edward E. Carnes); *id.* at 28,779 (1992) (announcing the confirmation of Judge Dennis G. Jacobs); *id.* at 34,240 (1992) (announcing the confirmation of Judge Timothy K. Lewis).

<sup>10</sup> RUTKUS & McMILLION, *supra* note 4, at 6 tbl.1. After April 2004, five circuit and twenty-seven district judges won approval. *Judicial Nominations: 108th Congress*, U.S. DEP’T OF JUSTICE ARCHIVE, <https://www.justice.gov/archive/olp/judicialnominations108.htm> (last visited Sept. 9, 2016). 2004 could be an exception, but the Republicans had a majority and fewer vacancies. After May 2008, four circuit and twenty district jurists won approval. *Judicial Nominations: 110th Congress*, U.S. DEP’T OF JUSTICE ARCHIVE, <https://www.justice.gov/archive/olp/nominations.htm> (last visited Sept. 9, 2016).

two Bill Clinton appellate court nominees.<sup>11</sup> In 2000, it promoted appointment of eight circuit judges.<sup>12</sup> In 2012, the Senate confirmed five Obama appeals court and forty-five trial court nominees.<sup>13</sup> This year, the Republican majority has approved one circuit nominee and eight district nominees.<sup>14</sup> Those records and the individuals confirmed show that Democrats, more than Republicans, directly apply the Rule only to controversial picks, so they find that accomplished, consensus nominees deserve appointment over the whole presidential election year.<sup>15</sup>

In short, the 2016 results powerfully contrast with Democrats' record approving four circuit and two dozen trial nominees at the comparable moment of Bush's administration.<sup>16</sup> The numbers portend badly this year, and the Republicans must sharply escalate confirmations now to match actions in 2007–08. Both parties should also persistently collaborate, especially by invalidating the Rule.

## II. PROBLEMATIC SELECTION AND THE THURMOND RULE

The explanations for selection difficulties and the Rule's insistent deployment are complex.<sup>17</sup> Although perceptive observers attribute the

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<sup>11</sup> RUTKUS & McMILLION, *supra* note 4, at 6 tbl.1. In January 1996, both circuit judges won approval. 141 CONG. REC. S19,325 (daily ed. Jan. 2, 1996) (announcing the confirmation of Judges A. Wallace Tashima and Sidney R. Thomas).

<sup>12</sup> RUTKUS & McMILLION, *supra* note 4, at 6 tbl.1. After June 2000, one circuit judge won approval. 146 CONG. REC. S7457 (daily ed. July 21, 2000) (announcing the confirmation of Judge Johnnie B. Rawlinson).

<sup>13</sup> *Judicial Nominations: 112th Congress*, U.S. DEP'T OF JUSTICE ARCHIVE, <https://www.justice.gov/archive/olp/judicialnominations112.htm> (last visited Sept. 4, 2016). After June 12, 2012, no circuit and twenty-two district judges won approval. Democrats had a majority in 2012. *Id.*

<sup>14</sup> *Archive of Judicial Vacancies*, *supra* note 7. In 2007–08, sixty-eight judges won approval, 162 CONG. REC. S4,797 (daily ed. July 6, 2016) (statement of Sen. Leahy), while in 2015–16, only twenty judges have won approval, 162 CONG. REC. S4,795 (daily ed. July 6, 2016) (statement of Sen. Booker).

<sup>15</sup> *Compare* 158 CONG. REC. S5,245 (July 23, 2012) (statement of Sen. Leahy), *with* Statement of Senator Chuck Grassley, Executive Business Meeting, Senate Judiciary Committee (May 19, 2016). "Consensus" is a malleable concept, and the notion can even be manipulated.

<sup>16</sup> Editorial, *The Senate's Confirmation Shutdown*, N.Y. TIMES (June 9, 2016), <http://nyti.ms/1TX5HrV>; *supra* notes 11, 14.

<sup>17</sup> Scholars and senators have long debated whether selection has always been controversial and politicized. Michael J. Gerhardt & Michael Ashley Stein, *The Politics of Early Justice: Federal Judicial Selection, 1789–1861*, 100 IOWA L. REV. 551, 553 (2015); Orrin G. Hatch, *The Constitution as the Playbook for Judicial Selection*, 32 HARV. J.L. & PUB. POL'Y 1035, 1038–39 (2009). Other longtime observers have debated the Thurmond Rule's meaning and efficacy. *Compare* Wheeler, *supra* note 1 (comparing the application of the Rule between the Bush and Obama Administrations), *with* Ed Whelan, *The Fictitious "Thurmond Rule"*, NAT'L REV. (Mar. 5, 2008, 4:06 PM), <http://www.nationalreview.com/bench-memos/51124/fictitious-thurmond-rule-ed-whelan> ("But it is highly dubious that Senator Thurmond ever proclaimed such a rule, and he certainly never implemented it.").

confirmation wars and the custom’s enhanced use to the Bork fight, the wars and the convention’s increased deployment are interrelated because the Rule currently serves as a potent weapon that combatants employ in quadrennial skirmishes, which punctuate these wars.<sup>18</sup> The observers ascertain that selection has collapsed, as witnessed in corrosive partisanship, systemic paybacks, and strident divisiveness whereby the parties ratchet down review.<sup>19</sup>

The consequences are grim. The very limited confirmation activity since 2015 means the bench possesses twelve circuit, seventy-six district, and thirty-five emergency vacancies.<sup>20</sup> The “few” unfilled judicial posts resulted from the Democrats’ 2013 release of the nuclear option; this curbed filibusters, which the Republicans had invoked when delaying three exceptional, moderate nominees’ appointments for the D.C. Circuit, the second most important tribunal.<sup>21</sup> But negligible confirmations across Obama’s last two years will spark many 2017 court openings and emergencies.<sup>22</sup> In fact, the Rule works perniciously by allowing vacancies to soar near the presidency’s conclusion, which makes the new administration confront manifold empty seats precisely when it addresses the daunting startup challenges of promptly establishing a government.<sup>23</sup>

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<sup>18</sup> See *supra* note 3 and accompanying text.

<sup>19</sup> The Rule exacerbates these complications. Most recent were claims that Democrats stalled Bush’s last two years and that Republicans created unprecedented delay over much of Obama’s first five years. Democrats then detonated the “nuclear option,” which allowed the Senate to confirm many judges in 2014’s lame duck session. The Republicans next drastically slowed appointments. Tobias, *supra* note 7, at 19–22; Seung Min Kim, *McConnell’s Historic Judge Blockade*, POLITICO (July 14, 2016, 5:16 AM), <http://www.politico.com/story/2016/07/mitch-mcconnell-judges-225455>.

<sup>20</sup> *Judicial Vacancy Summary for September 2016*, USCOURTS.GOV, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2016/09/summary> (last visited Sept. 9, 2016); *Judicial Emergencies for September 2016*, USCOURTS.GOV, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2016/09/summary> (last visited Sept. 9, 2016). The emergency vacancies rose from twelve in January 2015 to as many as thirty-four. *Archive of Judicial Vacancies*, *supra* note 7.

<sup>21</sup> Carl Tobias, *Filling the D.C. Circuit Vacancies*, 91 IND. L.J. 121, 121–22 (2015); Jeffrey Toobin, *The Obama Brief*, NEW YORKER, Oct. 27, 2014, at 24; see Tobias, *supra* note 7, at 33 (noting that the nuclear option facilitated many confirmations across 2013–14).

<sup>22</sup> *Future Judicial Vacancies for September 2016*, USCOURTS.GOV, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2016/09/future> (last visited Sept. 9, 2016); Russell Wheeler, *Recess is Over: Time To Confirm Judges*, BROOKINGS INST. (Sept. 6, 2016), <https://www.brookings.edu/blog/fixgov/2016/09/06/recess-is-over-time-to-confirm-judges/>; *supra* note 14; see Paul Bedard, *Federal Judge Retirements Surge, Next President to Remake Courts*, WASH. EXAMINER (Sept. 12, 2016), <http://www.washingtonexaminer.com/federal-judge-retirements-surge-next-president-to-remake-courts/article/2601526>.

<sup>23</sup> The Thurmond Rule partly explains vacancies’ rapid rise in 2009 and will partly explain a likely 2017 rise. See Sheldon Goldman, Sarah Schiavoni & Elliot Slotnick, *W. Bush’s Judicial Legacy: Mission Accomplished*, 92 JUDICATURE 258, 263–64, 267 (2009); Michael L. Shenkman, *Decoupling District from Circuit Judge Nominations: A Proposal to Put Trial Bench Confirmations on Track*, 65 ARK. L. REV. 217, 232

Slow approvals, compounded by the Rule's application, have numerous critical adverse impacts.<sup>24</sup> The stalled approvals cause nominees to leave careers on hold and dissuade myriad remarkable prospects from contemplating the bench.<sup>25</sup> Stymied appointments deprive courts of judicial resources and countless parties of justice.<sup>26</sup> Those damaging effects also undermine citizen regard for the selection procedures and the government.<sup>27</sup>

In sum, this canvass demonstrates the profound need for expeditious Senate assessment of nominees, which the Thurmond Rule's concerted deployment assiduously curtails. Accordingly, the chamber must institute salutary remedies that encourage increased yes or no votes, particularly through the mechanism's swift abrogation.

### III. SUGGESTIONS FOR THE FUTURE

#### A. *Short-Term Suggestions*

During the 2016 presidential election year, the Senate needs to cabin the Rule by following distinctly relevant precedent from 2007–08 when the Democratic majority helped approve ten Bush circuit and fifty-eight trial nominees. With minimal time left before December, securing these figures now could prove unrealistic, as the Republicans have slowly processed individuals ever since

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(2012); RUTKUS & McMILLION, *supra* note 4, at 18. *But cf.* RUTKUS & McMILLION, *supra* note 4, at 17 (stating that court vacancy rates have increased and decreased in the previous eight election years); Joe Palazzolo, *Obama's Successor Will Likely Fill Dozens of Judicial Vacancies*, WALL ST. J. (Mar. 18, 2016, 6:32 PM), <http://www.wsj.com/articles/obamas-successor-will-likely-fill-dozens-of-judicial-vacancies-1458340351> (predicting the large number of judicial vacancies that will need to be filled in 2017).

<sup>24</sup> Carl Tobias, *Senate Gridlock and Federal Judicial Selection*, 88 NOTRE DAME L. REV. 2233, 2253 (2013).

<sup>25</sup> Tobias, *supra* note 24, at 2253; Todd Ruger, *Nominees Are Living on Hold; Caught in a Political Game, Judicial Candidates Get Used to Waiting*, NAT'L L.J. (Dec. 17, 2012), <http://www.nationallawjournal.com/id=1202581557603/Nominees-are-living-on-hold>.

<sup>26</sup> JOHN G. ROBERTS, JR., 2010 YEAR-END REPORT ON THE FEDERAL JUDICIARY 7–8 (2010); Jennifer Bendery, *Federal Judges Burned Out, Overworked and Wondering Where Congress Is*, HUFFINGTON POST (Sept. 30, 2015, 2:15 PM), [http://www.huffingtonpost.com/entry/judge-federal-courts-vacancies\\_us\\_55d77721e4b0a40aa3aaf14b](http://www.huffingtonpost.com/entry/judge-federal-courts-vacancies_us_55d77721e4b0a40aa3aaf14b); Andrew Cohen, *In Pennsylvania, the Human Costs of Judicial Confirmation*, THE ATLANTIC (Sept. 9, 2012), <http://www.theatlantic.com/political/archive/2012/09/in-pennsylvania-the-human-costs-of-judicial-confirmation-delays/261862/>; Tobias, *supra* note 24, at 2253.

<sup>27</sup> Tobias, *supra* note 24, at 2253; Spencer S. Hsu, *Waiting for Next President, Confirmations of Federal Trial Judges Stall*, WASH. POST (June 5, 2016), [https://www.washingtonpost.com/local/public-safety/waiting-for-next-president-confirmations-of-federal-trial-judges-stall/2016/06/05/9b626aa4-222f-11e6-9e7f-57890b612299\\_story.html](https://www.washingtonpost.com/local/public-safety/waiting-for-next-president-confirmations-of-federal-trial-judges-stall/2016/06/05/9b626aa4-222f-11e6-9e7f-57890b612299_story.html); Shira A. Scheindlin, Opinion, *America's Trial Court Judges: Our Front Line for Justice*, N.Y. TIMES (May 6, 2016), <http://www.nytimes.com/2016/05/07/opinion/americas-trial-court-judges-our-front-line-for-justice.html>.

2015, confirming merely twenty recommendations. The party must equal the numbers from 2008 when Democrats rapidly appointed four Bush circuit and twenty-four district court submissions.<sup>28</sup> Attaining this many confirmations would necessitate chamber votes on three appellate candidates<sup>29</sup> and final ballots on sixteen of the trial level designees with reports.<sup>30</sup> That initiative could protect the status quo, preserve expectations—if warranted—and deter gaming of the system until the parties subscribe to permanent reform.

## *B. Long-Term Suggestions*

### *1. Abolishing the Thurmond Rule*

Most crucially, the Senate needs to devise a long-term approach, preferably by eliminating the Rule, a solution on which the parties must concur this year but would only start applying in the next presidential election season to limit unfair benefit for either party. When abolishing the counterproductive Rule, both parties should cooperate to fill the maximum vacancies by appointing dynamic, centrist nominees throughout presidential election years. Senators, therefore, would implement the protocol that governed before the Rule’s effectuation.<sup>31</sup>

The suggestion merits adoption because it duly honors constitutional phrasing and respects voters’ choices for President and Senate by permitting the chief executive to nominate and senators to carefully advise and consent about court members across the full terms of the President and senators.<sup>32</sup> This idea correspondingly addresses the needs of federal court judges, parties, and counsel for speedy, economical, and fair dispute resolution through decreasing vacancies.<sup>33</sup> Moreover, Thurmond’s proviso is not a law or even a Senate

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<sup>28</sup> See *supra* text accompanying note 10. This is a floor, *not* a ceiling.

<sup>29</sup> Seventh, Eighth, and Ninth Circuit nominees Donald Schott, Jennifer Klemetsrud Puhl, and Lucy Haeran Koh received committee hearings and panel votes. *On Judicial Nominations Before the S. Judiciary Comm.*, 114th Cong. (July 13, 2016) (statement of Sen. Leahy); *On Judicial Nominations Before the S. Judiciary Comm.*, 114th Cong. 1 (June 21, 2016) (statement of Sen. Leahy); *On Judicial Nominations Before the S. Judiciary Comm.*, 114th Cong. 1 (May 18, 2016) (statement of Sen. Leahy); Statement of Senator Chuck Grassley, Executive Business Meeting, Senate Judiciary Committee (Sept. 15, 2016); Statement of Senator Chuck Grassley, Executive Business Meeting, Senate Judiciary Committee (July 14, 2016); Statement of Senator Chuck Grassley, Executive Business Meeting, Senate Judiciary Committee (June 16, 2016).

<sup>30</sup> If seventeen of the nineteen nominees awaiting floor votes win approval, that would equal Bush’s 2008 appointments. *Archives of Judicial Vacancies*, *supra* note 7.

<sup>31</sup> See Kim, *supra* note 19.

<sup>32</sup> The appointments and recess appointments clauses envision nomination and advice and consent throughout presidential and senatorial terms. U.S. CONST., art. II, § 2, cl. 2–3.

<sup>33</sup> See FED. R. CIV. P. 1; Patrick Johnston, *Problems in Raising Prayers to the Level of Rule: The Example of Federal Rule of Civil Procedure 1*, 75 B.U. L. REV. 1325, 1328–29 (1995).



requirement, much less demanded by the Constitution. In fact, the Rule acutely contravenes the Constitution because it undercuts the document's explicit nomination and confirmation prescriptions.<sup>34</sup> The Rule in turn allows conflicting enforcement and confusion, and it is pervaded with exceptions. Indeed, the Rule serves principally to exacerbate the confirmation wars' most deleterious facets—striking partisanship and systemic paybacks—in successive presidential election years.<sup>35</sup>

Nonetheless, a Senate majority will probably oppose this initiative. A few senators would consider Rule abrogation a unilateral disarmament, not realistic or draconian, while others may lack the political courage to eliminate the Rule. Some will perceive that several purposes, which ostensibly supported its early articulation, have continued pertinence. For instance, when elections are imminent, chamber ballots may halt due to stated respect for the preferences that citizens would soon express through the election and concomitantly for the elected President and senators impending nomination and confirmation prerogatives.<sup>36</sup> The senators' propositions above must yield to (1) the specific constitutional directives, which authorize nomination coupled with advice and consent across the officials' whole tenure, (2) millions of voters' will evidenced in electing the *current* President and Senate, and (3) federal court, litigant, and practitioner needs for rapid, inexpensive, and equitable case disposition.<sup>37</sup>

## 2. *Modifying the Thurmond Rule*

Insofar as senators' concerns apply, federal politicians might satisfy them by codifying the provision as a formal chamber stipulation through relevant parameters that Democrats and Republicans do not "redefine" over succeeding presidential election years. This would clearly define the Rule and illuminate exactly how the proviso works. One critical example is the exclusion of able, consensus aspirants, an idea which leading senators from each party have

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<sup>34</sup> Editorial, *Reject the Thurmond Rule*, L.A. TIMES (July 12, 2012), <http://articles.latimes.com/2012/jul/12/opinion/la-ed-mcconnell-judicial-nominees-20120712>.

<sup>35</sup> See *supra* text accompanying note 19. Few policy or practical ideas support perpetuation of the Thurmond Rule.

<sup>36</sup> They resemble Republican reasons for not considering Merrick Garland, Obama's Supreme Court nominee. Mitch McConnell & Chuck Grassley, *McConnell and Grassley: Democrats Shouldn't Rob Voters of Chance to Replace Scalia*, WASH. POST (Feb. 18, 2016), [https://www.washingtonpost.com/opinions/mcconnell-and-grassley-democrats-shouldnt-rob-voters-of-chance-to-replace-scalia/2016/02/18/e5ae9bdc-d68a-11e5-be55-2cc3c1e4b76b\\_story.html?utm\\_term=.3aadfbfce503](https://www.washingtonpost.com/opinions/mcconnell-and-grassley-democrats-shouldnt-rob-voters-of-chance-to-replace-scalia/2016/02/18/e5ae9bdc-d68a-11e5-be55-2cc3c1e4b76b_story.html?utm_term=.3aadfbfce503).

<sup>37</sup> 162 CONG. REC. S2,684–85 (daily ed. May 11, 2016) (statement of Sen. Durbin); see *supra* text accompanying notes 32–33.

strongly championed or acknowledged. This clear definition honors the Constitution and invokes tradition before and even following the Rule’s initial use, most notably over the concluding Bush years.<sup>38</sup>

The chamber must prescribe the deadline by which appellate nominees would receive floor ballots. Grassley stated that the last presidential year’s first half was the contemporary benchmark.<sup>39</sup> But it seems advisable to permit September, or maybe the lame duck session, to be the deadline for final consideration on all nominees whom a chamber majority prefers to have Senate votes. September confirmations have occurred in recent Republican presidencies,<sup>40</sup> and the nuclear option dictated majority ballots for cloture.<sup>41</sup> Three arguments can substantiate relatively disparate treatment of appeals court prospects. First, administrations emphasize ideology when forwarding these recommendations.<sup>42</sup> Second, numerous circuit opinions enunciate policy and govern multiple, contiguous states.<sup>43</sup> Third, twenty-first century practice has been to approve no candidate during the second half of the President’s last year.<sup>44</sup>

The final group of propositions demonstrate why applying the Rule to district nominations would be unnecessary. Observers state that Presidents emphasize these nominees’ competence rather than ideology,<sup>45</sup> which means that nominees are comparatively mainstream. Trial level determinations also set less policy and cover smaller geographic regions.<sup>46</sup> Accordingly, the practice has been to confirm the jurists subsequent to Labor Day and even in post-election November.<sup>47</sup>

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<sup>38</sup> See *supra* notes 15, 32, 37 and accompanying text; *infra* note 40 and accompanying text.

<sup>39</sup> Statement of Senator Chuck Grassley, Executive Business Meeting, Senate Judiciary Committee (May 19, 2016); see *supra* notes 11–14.

<sup>40</sup> See *supra* notes 4, 8–9; see also *supra* note 5. But see *supra* note 10.

<sup>41</sup> See *supra* note 21. Lame duck votes would allow gaming the system, as the Republicans have with Garland. Amber Phillips, *3 Reasons Obama Is Still Trying to Get Senate Republicans to Consider Merrick Garland*, WASH. POST (Apr. 11, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/04/11/3-reasons-obama-is-still-trying-to-get-senate-republicans-to-consider-merrick-garland/>.

<sup>42</sup> See Shenkman, *supra* note 23, at 307.

<sup>43</sup> Shenkman, *supra* note 23, at 226–28; Tobias, *supra* note 24, at 2240–41.

<sup>44</sup> See *supra* note 39.

<sup>45</sup> Shenkman, *supra* note 23, at 226–29; Scheindlin, *supra* note 27.

<sup>46</sup> *Supra* note 43.

<sup>47</sup> See *supra* notes 9–10, 13, 19; RUTKUS & MCMILLION, *supra* note 4, at 8 (stating that in recent election years, many district court judges were confirmed in September and October).

## CONCLUSION

Chronic partisanship attends the Thurmond Rule's deployment, significantly propelling the splenetic confirmation wars across modern presidential election years. The chamber needs to abolish the Rule, or at least codify and confine the approach within the Senate rules until a clear majority who favors abrogation emerges.